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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 125

DOUBLE EAGLE REFINING COMPANY, Frank A. Kerran and Cameron L. Kerran, Individuals and Co-Partners, Trading and Doing Business as DOUBLE EAGLE REFINING COMPANY, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. V-XIII) affirming the Federal Trade Commission is reported at 265 F. 2d 246. The opinion and order of the Commission are set forth in the Transcript of Record (R. 34-41).

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1959. The petition for a writ of certiorari was filed on June 18, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Commission, proceeding under Section 5 of the Federal Trade Commission Act, was warranted in requiring that petitioners disclose the used-oil source of the motor oil which they market.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended, 15 U.S.C. 45) provides in relevant part:

> Section 5(a)(1) Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * *
>
> Section 5(a)(6) The [Federal Trade] Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce or unfair or deceptive acts or practices in commerce.
>
> * * * *

STATEMENT

Petitioners, an Oklahoma partnership, sell automobile motor oil to dealers for public resale under the trade name "Double Eagle".* On October 27, 1955, a Commission complaint challenged Double Eagle's failure to disclose on its oil containers and in its other publicity that the oil is derived substantially from re-

* Petitioners, re-refiners of motor oil, carry on their business in the manner described in the Government's brief opposing certiorari in *Mohawk Refining Corp.* v. *Federal Trade Commission*, No. 84, this Term.

refined used oil (R. 7). After hearing, the Commission's examiner, on April 19, 1957, issued an initial decision ordering petitioners to cease and desist from advertising or selling oil, derived from oil which has been previously used, without disclosing that fact (R. 32-34).

On appeal, the Commission adopted the examiner's decision without material modification (R. 36-41). Finding that consumers of oil are induced to buy Double Eagle brands in the mistaken belief that the product is one refined from virgin crude oil (R. 38), it concluded that, regardless of the quality of petitioners' oil, Double Eagle's failure to disclose the true source of its product constitutes an unfair method of competition and a deceptive practice within Section 5(a) of the Federal Trade Commission Act (R. 39). The Commission rejected the argument that relief would not be in the public interest because disclosure of the used-oil source would destroy the market for re-refined oil and thus waste valuable oil, citing the statement in *Federal Trade Commission* v. *Algoma Lumber Company* (291 U.S. 67, 81) that "conservation * * * is a good of large importance, but the end will have to be attained by methods other than a license to do business unfairly" (R. 40).

The Court of Appeals for the Tenth Circuit (one judge dissenting) affirmed.

ARGUMENT

The instant case raises factual and legal questions substantially the same as those presented in *Mohawk Refining Corp.* v. *Federal Trade Commission*, No. 84, this Term. As set forth in the brief in opposition filed

in that case, the Commission's holding that a failure to disclose the used-oil source of motor oil offered for public sale constitutes a violation of the Federal Trade Commission Act involves no novel question of law warranting review by this Court.

As the court below found, there is substantial evidence in the record to support the conclusions of the examiner (R. 33-34) and the Commission (R. 38) that "a substantial portion of the public who purchase lubricating oil prefer new and unused oil to that produced by the re-refining of crankcase drainings and other previously used oil" (Pet. App. VI). It is well established that misrepresentation can flow from failure to speak as well as from affirmative misstatement. See *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F. 2d 52, 58 (C.A. 4); *L. Heller & Son, Inc.* v. *Federal Trade Commission*, 191 F. 2d 954 (C.A. 7). And it is no defense that the quality of the misrepresented goods may equal that of the product which the public believes it is being offered. See *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212; *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67.

Petitioners argue that the motor oil they offer for sale, after completion of the re-refining process, not only equals the quality of oil refined from crude, but actually constitutes "new oil" which is "identical" to the oil produced from virgin crude (Pet. 9). But this is merely a different way of restating the argument rejected by this Court in the *Royal Milling* and *Algoma Lumber* cases, *supra*. If a public preference exists, albeit capriciously, for a product derived from

one source as opposed to another, the deceptive concealment of this source violates the Act even if the end products may be otherwise indistinguishable.

Certainly there is no merit to petitioners' argument (Pet. 18-21) that, public attitudes being what they are, requiring it to disclose the source of its oil may result in discrimination against it in favor of competitors refining their oil from crude oil. There is nothing in the Commission's order which precludes petitioners from making such representations as they please concerning the quality of their product, so long as they also disclose its source. Deceptive concealment is not a permissible substitute for education of the consumer. As the court below pointed out (Pet. App. VIII), the basic theory of Section 5 is that "deception of the purchasing public" is to be prevented regardless of the objectives or the business advantages of such practice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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